

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Promoting Efficient Use of Spectrum Through
Elimination of Barriers to the Development of
Secondary Markets

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WT Docket No. 00-230

To: The Commission

COMMENTS OF THE BLOOSTON LAW FIRM

Submitted by:

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Dated: December 5, 2003

SUMMARY

In the *Further Notice*, the FCC seeks comment on various potential measures, beyond the steps initiated in the *Secondary Markets Order*, to promote the use of secondary markets. To begin, the Blooston Rural Carriers applaud the FCC and, in particular, the Office of Engineering and Technology the Wireless Telecommunications Bureau, and the Spectrum Policy Task Force, for their ongoing efforts in revising the Commission's policies for interpreting *de facto* control under Section 310(d) of the Communications Act of 1934, as amended (the "Act") and in crafting new rules to facilitate a variety of spectrum leasing arrangements that are suited to the parties' respective needs.

In order for the Commission's secondary market initiatives to make a real difference in rural and underserved areas, where few large carriers have found sufficient economic incentives to provide service and where license disaggregation and/or partitioning transactions have proven to be unpopular, the Commission will need to go further. First, the Commission should adopt a policy whereby small business licensees can lease their spectrum without jeopardizing eligibility status or entitlement to bidding credits if the spectrum user actually provides service to a rural area. Second, the Commission should adopt further incentives, such as reduced license payment obligations or enhanced buildout credits, for licensees that partition their licenses to or that enter into long-term lease arrangements with rural telephone companies that seek to provide service to rural or underserved territories. Finally, the Blooston Rural Carriers encourage the Commission to expand its new *de facto* control policies to other contexts.

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COMMENTS OF THE BLOOSTON LAW FIRM

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (“Blooston”), on behalf of its clients listed in Attachment A hereto (the “Blooston Rural Carriers”) and pursuant to Rule Section 1.419 of the Commission’s Rules, hereby submits comments to the Further Notice of Proposed Rulemaking in the above-captioned proceeding regarding the development of secondary markets in spectrum usage rights.¹

Statement of Interest

The entities listed in Attachment A represent a variety of rural telephone company interests and small businesses that are engaged in the provision of wireless services to the public. Each has a significant interest in the outcome of this proceeding because each has an interest in seeing that the FCC adopts policies and rules that ensure meaningful rural telephone company and small business participation in the secondary spectrum market, and that encourage the rapid deployment of advanced telecommunications services in rural America.

¹ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 00-230, FCC 03-113 (*rel.* October 6, 2003) (hereinafter referred to as “*Secondary Markets Order*” or “*Further Notice*,” as appropriate).

COMMENTS

In the *Further Notice*, the FCC seeks comment on various potential measures, beyond the steps initiated in the *Secondary Markets Order*, to promote the use of secondary markets. To begin, the Blooston Rural Carriers applaud the FCC and, in particular, the Office of Engineering and Technology the Wireless Telecommunications Bureau, and the Spectrum Policy Task Force, for their ongoing efforts in revising the Commission's policies for interpreting *de facto* control under Section 310(d) of the Communications Act of 1934, as amended (the "Act") and in crafting new rules to facilitate a variety of spectrum leasing arrangements that are suited to the parties' respective needs.

In order for the Commission's secondary market initiatives to make a real difference in rural and underserved areas, where few large carriers have found sufficient economic incentives to provide service and where license disaggregation and/or partitioning transactions have proven to be unpopular, the Commission will need to go further. First, the Commission should adopt a policy whereby small business licensees can lease their spectrum without jeopardizing eligibility status or entitlement to bidding credits if the spectrum user actually provides service to a rural area. Second, the Commission should adopt further incentives, such as reduced license payment obligations or enhanced buildout credits, for licensees that partition their licenses to or that enter into long-term lease arrangements with rural telephone companies that seek to provide service to rural or underserved territories. Finally, the Blooston Rural Carriers encourage the Commission to expand its new *de facto* control policies to other contexts. In support of these proposals, the Blooston Rural Carriers provide the following comments:

I. The Commission Should Modify its Designated Entity Policies to Encourage the Provision of Service to Rural Areas

In the *Further Notice*, the FCC seeks comment on whether it should modify the policies adopted in the *Secondary Markets Order* for designated entity leasing under the *de facto* transfer leasing option.² As discussed below, the Blooston Rural Carriers urge the Commission to allow designated entity or entrepreneur licensees to lease some or all of their spectrum usage rights to any entity, regardless of whether that entity would qualify for the same small business designated entity status of the licensee, so long as the lessee agrees to extend service to rural areas.

The Commission has adopted policies and rules for designated entity *de facto* transfer leasing in its *Secondary Markets Order* whereby all of the particular service rules applicable to the licensee under its license authorization – both interference and non-interference related – will apply to the lessee.³ This includes the Commission’s designated entity and entrepreneur policies and rules. Therefore, a small business licensee that sought to use the *de facto* transfer leasing option to facilitate the financing and buildout of its network would be required to make unjust enrichment payments to the Commission, if the lessee did not itself qualify for the same small business status. Similarly, an entrepreneur that acquired a C- or F-Block broadband PCS license in closed bidding could not enter into a *de facto* transfer lease with a non-entrepreneur until after its five-year construction requirement had already been met. While these policies and rules are appropriate to prevent “sham” leasing arrangements whose purpose is to circumvent the Commission’s designated entity rules, these same rules may prevent *bona fide* small businesses and rural telephone companies from entering into the

² *Further Notice* at ¶ 323.

³ *Secondary Markets Order* at ¶¶ 142-149.

types of partnerships and joint management/operating arrangements that are needed to create meaningful economies of scale and to equitably share the costs and risks involved in launching wireless networks in a sparsely populated rural markets.

To facilitate the types of creative business arrangements that are needed to bring advanced wireless services to large portions of rural America, the Commission should allow designated entity or entrepreneur licensees to lease some or all of their spectrum usage rights to any entity, regardless of the whether that entity would qualify for the same small business designated entity status of the licensee, so long as the lessee is obligated to extend service to rural areas. In this regard, the Commission should presume such leasing arrangements are in the public interest where (a) the underlying license is a Rural Service Area (RSA) license, (b) the leased area is in any BTA where a majority of the pops are in RSA counties, or (c) a majority of the population of the leased area resides in RSA counties.

The public interest benefits of revising the Commission's *de facto* control leasing rules as proposed by the Blooston Rural Carriers are clear. Allowing small businesses, rural telephone companies and entrepreneurs to enter into general partnerships, limited liability companies, and other business arrangements where profits and losses are shared evenly, and where the risks may be spread across a larger group, without jeopardizing the small business status of rural licensees that seek to lease spectrum rights to the larger group, will promote the formation of capital and sound business arrangements that are needed for the rapid buildout of rural wireless networks. At the same time, it will allow *bona fide* small businesses to retain the value of their bidding credits, to devote more of their resources toward the provision of service to rural consumers, and to participate in future spectrum auctions without having to forgo their *bona fide* small business status.

The Blooston Rural Carriers believe there are no unjust enrichment issues raised by such an arrangement, so long as each participant in the leasing arrangement remains a *bona fide* small business. To the extent that participants in such a leasing arrangement are not eligible for small businesses status, the Commission should find that its statutory obligations of ensuring the participation of rural telephone companies in the provision of advanced telecommunications services and ensuring the rapid deployment of new technologies, products or services for the benefit of the public, including those residing in rural areas, outweigh any risk of unjust enrichment.

II. The Commission Should Adopt Financial and Regulatory Incentives to Promote Geographic Partitioning and Long-Term Lease Arrangements in Rural and Underserved Markets

As noted above, the Blooston Rural Carriers are encouraged by the Commission's action in removing unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights. The policies, rules and procedures adopted in the *Secondary Markets Order* take important first steps to facilitate broader access to spectrum resources. However, the existing regulatory scheme for wireless services does not give licensees an adequate incentive to participate in the secondary market, and may not go far enough to ensure the optimally efficient use of spectrum in rural areas. For this reason, and to promote the statutory objective of ensuring that advanced telecommunications capability is available to all Americans in a reasonable and timely fashion, the Commission should adopt a variety of regulatory and financial incentives to promote geographic license partitioning and/or long-term lease arrangements with carriers that seek to provide service in rural areas. Such incentives would help to fulfill the Commission's obligation under Section 309 (j) of the Act, to ensure the participation of rural telephone companies in the provision of advanced telecommunications services.

The Blooston Rural Carriers believe that spectrum leases will be a valuable tool. However, in a number of situations, carriers will need the certainty and permanence of licensee status that can only be provided by a true partitioning arrangement, before a rural telco board of directors or other financing source will approve the expenditure of resources on a substantial telecommunications system.

a. Enhanced “Rural Partitioning” Bidding Credits

Under the scheme that is proposed by the Blooston Rural Carriers, auction winners will receive financial incentives, by way of a reduction in their final license payment obligation, for entering into *bona fide* license partitioning transactions with non-affiliated businesses that have agreed to extend service to rural markets. In this instance, rural markets could be defined as areas that are (1) contiguous with a Rural Statistical Area (“RSA”), or a BTA which has a population of no more than 1,000,000 pops; or (2) centered around the certificated rural telephone service area of the partitioning carrier. The amount of a licensee’s final payment reduction would be equal to the percentage of partitioned coverage in relation to the entire service area (measured by the number of pops).

As an example, the hypothetical winner of an EAG license with a net high bid of \$10,000,000 would be provided with an opportunity (*e.g.*, upon submission of its long-form license application) to indicate whether and to what extent it wanted to partition rural areas from its license. Assuming that 30% of the EAG consisted of RSA or rural BTA territory, the auction winner would be able to indicate its desire to receive a license payment reduction of 30%, upon agreeing to partition these areas to rural telephone companies within the EAG. If this auction winner instead sought a 25% rural partitioning credit, preferring to keep some of the rural area for itself, it would receive a 25% credit.

Under the Blooston Rural Carriers proposal, the licensee would have one year from the initial grant date of its license to enter into bona-fide partitioning arrangements with qualified rural telephone companies, and its final payment obligation would be reduced accordingly. The licensee would be permitted to negotiate any arms-length partitioning arrangement it wanted, offering it to the highest qualified bidder in a secondary market transaction or simply electing to give the spectrum away to qualified rural carriers for the value of the credit. At the one year anniversary of the license grant, the licensee would be required to submit evidence that it had filed partial assignment applications covering the percentage of territory it had agreed to partition, or to repay the FCC for the balance of the discount attributable to any area it was not able to partition, plus interest.

b. Enhanced Buildout Credit for Entering Into Rural Partitioning or Long-Term Lease Agreements

Currently, the only incentive for a licensee to partition its spectrum to a rural carrier is the ability to reduce its coverage and service obligations proportionally. However, because rural service areas are by definition sparsely populated, this reduction in buildout obligation is generally small enough that larger carriers have found little or no incentive to enter into rural partitioning agreements. In order to make the partitioning mechanism meaningful, the Commission should provide that the partitioning licensee will receive triple, quadruple or quintuple credit for the population partitioned. A similar incentive should be offered when a licensee enters into a long-term, binding lease agreement with a rural telephone company or its subsidiary. Such lease agreement must provide that in the event the licensee sells its overall license, the purchaser must honor the term of the lease arrangement. In the event of license forfeiture, the Commission should either allow the rural carrier to purchase its leased area as a partitioned license (at the per-pop bid price paid by the original licensee); or should

allow the rural carrier to continue operation on its leased spectrum until the license is reaucted. The latter option would prevent a disruption of service, and give the rural carrier an opportunity to negotiate a similar lease arrangement with the subsequent auction winner while its long-form application is pending.

III. Achieving a More Efficient Spectrum Marketplace / Advanced Secondary Markets Initiatives

a. The Commission's Role in Providing Secondary Market Information and Facilitating Exchanges

To improve efficiency in the market for spectrum usage rights, the FCC seeks comment on what additional steps it should take to encourage the development of mechanisms for providing necessary spectrum information to licensees with underutilized spectrum and those in need of access to spectrum. In this regard, the Commission has previously proposed options that would accomplish three tasks. First, it would maintain an on-line listing of licenses by service, frequency and service area as the simplest means for identifying spectrum to potential buyers and sellers; second, it would support the development of services that list spectrum resources that licensees are actively offering for sale or lease; and third, it would support the establishment of private spectrum exchanges and brokers who would match parties interested in acquiring spectrum usage rights with suitable resources held by existing licensees.⁴

The Blooston Rural Carriers believe that the Commission should view its primary role as ensuring the continuing accuracy and timeliness of information contained in its public licensing records. As the Commission has noted, the FCC already collects a significant

⁴ *Further Notice* at ¶ 222 (citing Principles for Promoting Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178 (2000) (“*Policy Statement*”) at ¶¶ 38-39.

amount of useful data based on the notifications and applications that are filed by licensees via ULS, and the framework set forth in the *Secondary Markets Order* provides for the public availability of additional information in the spectrum lease context.⁵ Based on this information, prospective spectrum users should be able to identify licensees that have rights to the spectrum resources that they seek in any given geographic market, as well as appropriate licensee contact information.

At the same time, the Commission should not seek to collect additional information from licensees, spectrum lessees or other authorized users about the nature of their operations, such as detail about the geographic area actually covered and the frequencies actually used, unless this information is provided voluntarily. This type of information often has competitive significance and may be viewed by the licensee as being proprietary. Moreover, it would be burdensome for licensees, especially if they are small businesses, to continually update and revise the Commission's records as they construct their networks and as details about the exact nature of their spectrum use may change. The Commission already collects similar data from licensees in the form of buildout showings, and this data is freely available to the public via ULS.

In keeping with the voluntary, market-driven nature of the policies and rules adopted in the *Secondary Markets Order*, the Commission should view participation in the secondary market as a right, rather than a requirement. It should provide incentives for licensees to make their spectrum available to third-party spectrum users, as discussed above, but it should avoid any special role in the establishment of additional information services, such as listing offers to transfer, assign or lease, establishing exchange mechanisms, or brokering

⁵ Further Notice at ¶ 225.

exchanges. In this regard, the Blooston Rural Carriers agree with the Commission that the private sector is better suited to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties.⁶ Likewise, the Commission should neither participate in nor discourage the emergence of “market-makers” that facilitate spectrum leasing transactions. If and when a robust secondary market for spectrum use rights develops, the Commission can address issues related to the organization and behavior of market-makers at that time.

b. Developing Policies that Maximize Potential Public Benefits Enabled by Advanced Technologies, Including Opportunistic Devices

Following up on recommendations made in the *Spectrum Policy Task Force Report*, the Commission seeks comment regarding its policies on access to spectrum as provided by so-called “opportunistic devices” in currently licensed spectrum bands. In particular, the Task Force has suggested that the FCC “focus on advancing and improving secondary markets approach to access to spectrum by opportunistic devices during the near term.”⁷

While opportunistic devices may have a role to play in facilitating the intensive and efficient use of the radio spectrum, the Blooston Rural Carriers believe that such operations should only be allowed on licensed spectrum pursuant to a spectrum lease or other negotiation with the incumbent licensee. Opportunistic devices will create the potential for interference, and even if there are clear cut incumbent protection rights on the books, enforcement can be difficult. Therefore, the incumbent licensee should be in a position to decide whether to risk such situation, and should be compensated for taking the risk.

⁶ *Further Notice* at ¶ 226.

⁷ *Further Notice* at ¶ 233.

As the Task Force has observed, it is important to ensure that secondary operations pose no adverse consequences for the incumbent licensees.⁸ In many cases, these entities paid substantial sums for their licenses at auction, and have expended even greater resources on equipment, engineering, site acquisition, and other construction costs. It would be inequitable and adverse to the public interest to compromise their operations in any way.

In addition to the potential for harmful interference from opportunistic devices, the Commission must recognize that opportunistic devices may have a significant economic impact on incumbent licensees. This is especially true in rural areas, where the cost of providing commercial service is often much greater, and where being first to market often determines whether a service will be economically viable. In this case, the Blooston Rural Carriers believe it would be unfair to allow users of opportunistic devices to “set up shop” on a new licensee’s spectrum, at the same time when the licensee is trying to establish its nascent business.

IV. Forbearance from Individualized Prior FCC Approval for Certain Categories of Spectrum Leases and Transfers of Control/License Assignments

In the *Further Notice*, the FCC seeks comment on whether to forbear from individual prior review and approval for certain categories of leasing arrangements involving a transfer of *de facto* control that would not raise any public interest concerns.⁹ In this regard, the Blooston Rural Carriers agree that such forbearance will beneficially affect a significant number of arrangements without undermining the Commission’s public interest objectives.

⁸ *Spectrum Policy Task Force Report* at p. 58.

⁹ *Further Notice* at ¶ 244.

The Blooston Rural Carriers agree that the Commission should forbear from the requirements of Sections 308, 309 and 310(d) of the Communications Act and instead to process notification filings regarding leases where (1) the lessee satisfies all applicable eligibility and use restrictions associated with the leased spectrum; (2) the lessee is in compliance with any foreign ownership provisions applicable to the licensee; and (3) the arrangement raises no anti-competitive concerns. The requirement that the parties to a spectrum lease arrangement that qualifies for forbearance must file a notification with the Commission within 14 days of executing a *de facto* transfer lease appears to be reasonable and is consistent with the Commission's policies that require a post-assignment notification in cases where a license assignment or transfer of control meets similar forbearance criteria. Moreover, the Blooston Rural Carriers urge the Commission to adopt the same forbearance procedures in the context of licensees that are designated entities and/or entrepreneurs, so long as the lessee can certify that it is eligible for the same level of competitive bidding benefits, such as bidding credits, as the licensee from which it is leasing.

V. Extending the Commission's Secondary Market Policies to Additional Spectrum-Based Services

While the Commission's Section 10 forbearance authority applies only to providers of telecommunications services, and the Commission may forbear from applying Section 310(d) requirements only for leases involving telecommunications carriers and telecommunications services, the Blooston Rural Carriers urge the Commission to explore whether it can provide similar relief to parties whose lease transactions otherwise meet the conditions for forbearance processing, but that do not fall within the scope of Section 10. Such treatment is necessary and appropriate in order to place substantively similar wireless

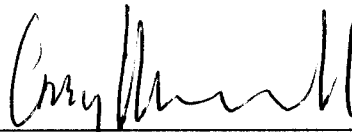
transactions involving different types of licenses on an equal footing, and to minimize regulatory discrimination.

CONCLUSION

Wherefore, consistent with the proposals outlined above, the Blooston Rural Carriers urge the Commission to adopt policies and rules that ensure meaningful rural telephone company and small business participation in the secondary market and that encourage the rapid deployment of advanced telecommunications services in rural America.

Respectfully Submitted,

The Blooston Rural Carriers

A handwritten signature in black ink, appearing to read "John A. Prendergast", is written over a horizontal line.

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Attachment A

A list of the small businesses and rural telephone companies that comprise the “Blooston Rural Carriers” is provided below.

- Golden West Telecommunications Cooperative, Inc. (and its subsidiary GW Wireless, Inc.)
- Interstate Telecommunications Cooperative, Inc. (and its subsidiaries Stateline Telecommunications, Inc. and Interstate Satellite Services, Inc.)
- James Valley Cooperative Telephone Company (and its subsidiary Northern Valley Wireless, Inc.)
- Kennebec Telephone Company, Inc.
- McCook Cooperative Telephone Company (and its subsidiaries Hanson County Telephone Company and Hanson Communications, Inc.)
- Midstate Communications, Inc. (and its subsidiary Midstate Wireless, Inc.)
- Mobile Phone of Texas, Inc.
- Penasco Valley Telephone Cooperative, Inc. d/b/a Peñasco Valley Telecommunications (and its subsidiaries PVT Networks, Inc. and PVT Wireless Limited Partnership)
- Santel Communications Cooperative
- SRT Communications, Inc. (and its subsidiary North Dakota Network Co.)
- Alliance Communications Cooperative, Inc. (formed through the merger of Splitrock Telecom Cooperative, Inc. and Baltic Telecom Cooperative on January 1, 2003)
- Valley Telecommunications Cooperative Association, Inc. (and its subsidiary Valley Cable & Satellite Communications, Inc.)
- Venture Communications, Inc. (and its subsidiary Venture Wireless, Inc.)
- West River Cooperative Telephone Company